

New FCC Rules on the Recovery of Funds

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In an initial Order (FCC 99-292), adopted by the FCC in 1999, a so-called Commitment Adjustment ("COMAD") process was set forth directing USAC to recover E-rate funds incorrectly committed or disbursed in contravention of FCC rules. With limited exceptions, the COMAD process required repayments to be made by the service providers (to whom the actual payments had been made). Recovery of funds from the applicants, if appropriate, was left to the vendors.

However, earlier this summer, the FCC released a Fourth Report and Order (FCC 04-181) modifying the COMAD process so that the recovery of improperly disbursed funds would henceforth be "...directed at whichever party or parties has committed to determine which applicant and/or vendor "...was in a better position to prevent the...violation, and which party committed the act or omission that forms the basis for the...violation."

One of our comments on the Fourth Order at the time of its release was that we expected to see a certain amount of finger pointing between applicants and service providers (see Fourth Order Comments). This has already begun. At least one FCC appeal already argues, in the first instance, that a recovery action against the vendor should be reversed because there was, in fact, no rule violation. But the appeal goes on to argue that, should the reimbursement claim be upheld, payment should be sought from the applicant.

The Fifth Order, released only two weeks after the Fourth, deals with the what, when, and how of funds recovery. The Order notes that recovery may not be appropriate for the violation of all rules, regardless of codification, but does provide a fairly specific list of recoverable violations, including those involving:

- * Competitive bidding requirements.
- * Necessary resources (i.e., Item 25) certifications.
- * Service substitutions.
- * Failure to pay non-discounted shares.
- * Duplicative services.
- * Completion of services outside the funding year.
- * Discount calculation violations.
- * Partial year services funded for the entire year.
- * On a case-by-case basis, situations in which "...a service provider has charged...an inflated price" or in which the applicant "...has not made a bona fide request based on its reasonable need."

The Order effectively establishes a statutory term limit on an applicant's or vendor's reimbursement responsibilities by limiting audits or investigations that would lead to recovery to five years from the final delivery of service for a specific funding year. This corresponds to the five-year record retention rule also formalized in the Fifth Order.

The Order also establishes rules governing the rights and responsibilities of parties subject to an E-rate recovery action. These new rules are based on the Debt Collection Act of 1996 which governs the collection of other claims owed to the U.S. A discussion of these rules is provided in the Small Entity Compliance Guide published by the FCC last week (see Compliance Guide). Three aspects of the rules are particularly important.

1. As with other E-rate decisions, recovery actions remain subject to SLD or FCC appeal. One important point to note, however, is that the rules apparently require challenges to the validity of any debt to be made within 15 days of the notice of the debt. Other E-rate appeals may be filed anytime within 60 days of a decision.
2. Payments are generally due within 30 days of the requests. The collection process is not stayed by any appeal. Interest, fees, and penalties may apply after 30 days. Installment payments, or other "arrangements," can be negotiated under certain circumstances. Recovery amounts cannot be offset from future E-rate funds.
3. A "red light rule" applies to any delinquent payor. The rule requires USAC to dismiss any outstanding request for funding commitments by either a delinquent applicant or a delinquent service provider. If the recovery request is under appeal, USAC will defer, rather than dismiss, new funding decisions. The SLD has not yet indicated if it will develop a system to alert applicants of vendor red light situations, or vice versa.

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